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**Testimony of Attorney Steven B. Kaplan
Legal Counsel, Connecticut Subcontractors Association
Re: Raised Bill No. 5379—"An Act Concerning Offers of Compromise
in Arbitration of Construction Contracts"**

COMMITTEE ON JUDICIARY-- March 26, 2010

My name is Steven B. Kaplan. I am Legal Counsel to the Connecticut Subcontractors Association, a trade association that represents the subcontracting industry in our state, and I submit this testimony on the CSA's behalf. I have practiced construction law in Connecticut for 28 years. I also am a founding member and the current Chairman of the Construction Law Section of the Connecticut Bar Association.

Members of the Connecticut Subcontractors Association (CSA), as well as myself and other construction attorneys, support the passage of Raised Bill No. 5379, "An Act Concerning Offers of Compromise in Arbitration of Construction Contracts."

The bill addresses two important points, both very consistent with existing Connecticut law: (1) providing the mechanism for an "offer of compromise" in construction arbitration proceedings that is presently available in court cases, and (2) clarifying the intent of Conn. Gen. Stat. §42-158m that adjudication of disputes arising out of Connecticut construction projects must proceed in Connecticut and under Connecticut law—including mediations and arbitrations.

(1) OFFERS OF COMPROMISE FOR ARBITRATION: The existing offer of compromise statutes for civil court cases, Conn. Gen. Stat. §52-192a & §52-193 et seq, provide mechanisms whereby parties to a lawsuit can file an offer of compromise and receive interest and attorney's fees if the other party does not accept the offer and the resulting judgment in the case favors the offering party to the same or better extent than the amount of the offer. These mechanisms promote settlement of lawsuits by encouraging realistic settlement offers, and by providing penalties if the other party does not accept the offer and fares worse after a trial.

There are no comparable settlement procedures available for construction arbitration proceedings, which can be just as costly as court cases. There is no sound reason why parties to a construction arbitration should not benefit from similar mechanisms that encourage settlements in court. Moreover, since most significant construction contracts **require** arbitration in lieu of litigation, construction disputes generally are not subject to the existing offer of compromise procedures that are available for litigants.

There is no sensible reason why the offer of compromise mechanism—which promotes settlement short of trial—should not be extended to construction arbitration proceedings. Section 1 of the Raised Bill would implement this mechanism in a sensible and practical way that closely resembles the existing procedures for filing an offer of compromise in civil litigation.

(2) CLARIFYING JURISDICTION FOR CONSTRUCTION MEDIATION & ARBITRATION: Section 2 of the Raised Bill would clarify an unintended ambiguity of Conn. Gen. Stat. §42-158m, which presently requires that all disputes arising out of construction projects in Connecticut be “adjudicated” under Connecticut law and in Connecticut. This existing law is very important, because it eliminates the ability of out of state contractors or developers from gaining an advantage over Connecticut contractors and subcontractors through contract language that moves venue and choice of law outside of Connecticut for disputes that arose on Connecticut projects. The present bill would clarify that provision by expressly including mediation and arbitration within this same proviso, and voiding any construction contract clauses that provide otherwise.

Farness and common sense dictates that any dispute that arises out of a Connecticut construction project—be it resolved through mediation, arbitration or litigation—should be resolved in Connecticut and under Connecticut law. Although it is easy to argue that the word “adjudicated” in the present statute already includes mediation and arbitration, there has been some uncertainty regarding these procedures. The proposed clarification would eliminate this unnecessary debate.

In conclusion—please pass this bill. Thanks very much to the Judiciary Committee for considering this important legislation.